

ORDINANCE NO. 20051020-050

**AN ORDINANCE APPROVING A SETTLEMENT AGREEMENT WITH
KENMARE PARTNERS LTD. AND BURY + PARTNERS, INC.**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

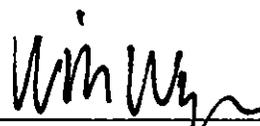
PART 1. The City Manager is directed and authorized to negotiate and execute a Settlement Agreement with Kenmare Partners, Ltd. and Bury + Partners, Inc. that includes terms and conditions substantially similar to those in the attached Exhibit A, including waivers of fees, and other terms and conditions deemed necessary, advisable or required by the City Manager or City Attorney.

PART 2. This ordinance takes effect on October 31, 2005.

PASSED AND APPROVED

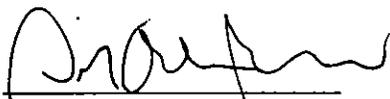
October 20 _____, 2005

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Will Wynn
Mayor

APPROVED:



David Allan Smith
City Attorney

ATTEST:



Shirley A. Brown
City Clerk

EXHIBIT A

FINAL SETTLEMENT AGREEMENT

This Final Settlement Agreement (Agreement) is entered into by Kenmare Partners Ltd. (Daugherty), Bury + Partners, Inc. (BURY), and the City of Austin, a home-rule municipality (City).

RECITALS

- A. The purpose of this Agreement is to set forth the terms of a settlement concerning certain drainage channel improvements and issues relating to approximately three (3) acres of land located at 1401 South Pleasant Valley Road in the City of Austin owned by Daugherty and more particularly described in the attached Exhibit "A" ("Property")
- B. With no admission of responsibility on the part of any party, and in an effort to compromise and settle all potential issues among the parties, Daugherty, Bury and the City enter into this Agreement under which Bury shall design and construct, and all three parties shall jointly fund, drainage channel improvements. The drainage channel improvements required under this Agreement include, but are not limited to, pipes, channels, berms and inlets to safely convey the fully developed 100 year off-site flows (unless otherwise approved by the City) that now enter the Property via box culverts on the western edge of the Property and via over-flow from Pleasant Valley and/or Elmton Road over the Property and over off-site properties to Country Club Creek ("Drainage Improvements").

AGREEMENT

Therefore, in satisfaction of the recitals set forth above and acknowledging as sufficient consideration the mutual covenants to follow exchanged between the parties, Daugherty, Bury and the City agree as follows:

I. Recitals Incorporated.

The above recitals and all terms defined therein are incorporated into this Agreement for all purposes.

II. Daugherty

- A. Daugherty shall pay the sum of \$15,000 to be used by Bury toward the cost of construction of the Drainage Improvements.
- B. At such time as Daugherty develops the Property and participates in the Regional Stormwater Management Program ("RSMP") as authorized in Section III. E. of this Agreement, any applicable RSMP fees relating to the Property will be off-set by the

\$15,000 paid under this Agreement plus the \$92,000 spent on prior on-site improvements for a total off-set of \$107,000.

- C. Daugherty may opt to provide on-site detention in lieu of or in addition to participation in RSMP.
- D. Daugherty shall dedicate easements to the City that are reasonably required for the Drainage Improvements, if any. The Easements dedicated under this Agreement shall be in a form acceptable to the City Attorney.

III. CITY

- A. The Drainage Improvements are not considered a "City" project for any purposes.
- B. City shall pay an amount not to exceed the sum of \$200,000 to be used by Bury toward the cost of construction of the Drainage Improvements.
- C. City shall employ the services of a third party engineer to review the drainage component of the Drainage Improvements and to oversee draw requests under Section V.A. of this Agreement. Review under this Agreement and release of the application for the Drainage Improvements by the City does not constitute a verification of all data, information and calculations supplied by the engineer of record. The engineer of record is solely responsible for the completeness, accuracy and adequacy of the Drainage Improvements.
- D. City shall waive all review and inspection fees relating to the Drainage Improvements.
- E. After the Drainage Improvements are complete and have been inspected, approved and accepted by the City, and at such time as Daugherty seeks to develop the Property, the City agrees to approve Daugherty's participation in the RSMP based only on on-site flows so long as Daugherty demonstrates conveyance of the on-site flows in compliance with City Code requirements.
- F. The City agrees that after the Drainage Improvements are complete, inspected, approved and accepted by the City, Daugherty is responsible for detention and conveyance of on-site flows resulting from development of the Property only and no other.

III. BURY

- A. Bury shall pay all sums over and above \$215,000 (currently estimated to be \$257,248, using a total project cost of \$472,248) necessary for design, permitting, and construction of the Drainage Improvements.
- B. Bury shall be responsible for implementation of the Drainage Improvements, including designing, obtaining necessary permits, acquisition of necessary easement and license agreements and shall contract for and oversee the construction of the Drainage Improvements to completion and acceptance by the City.

- C. Bury shall design the Drainage Improvements to safely convey flows in accordance with the City's Land Development Code through or around the Property and through other off-site property to Country Club Creek.

IV. ALL PARTIES

- A. Upon final execution of this Agreement, all three parties shall contribute their respective payments into a construction escrow account to be held by Heritage Title Company. Milestones upon which Bury may draw on the account for progress payments shall be set out in the Escrow Agreement between the parties and Heritage Title.
- B. Each of the parties shall use reasonable efforts to cooperate with the others in fulfilling the terms of this agreement in a timely manner. City shall facilitate review and inspection during construction and shall perform all inspections in a timely manner.
- C. To the extent that the total construction cost of the Drainage Improvements is less than \$472,248, the parties shall share in the cost savings proportionate to their contributions.
- D. Upon completion and acceptance of the Drainage Improvements by the City, Daugherty, City and Bury shall be deemed to have mutually released one another from any further claims or responsibility associated with the Drainage Improvements and the drainage conditions in the vicinity of Pleasant Valley and Elmout Drive and shall execute mutual releases as may be reasonably requested.

V. General Provisions

- A. This Agreement contains the final entire agreement between Bury, Daugherty, and the City with regard to the matters set forth and shall be binding upon and inure to the administrators, personal representatives, trustees, successors and assigns for each.
- B. No term or provision of this Agreement may be varied, changed, modified, waived, discharged or terminated except by an instrument in writing signed by all parties.
- C. This Agreement shall be governed by, construed and enforced in accordance with, and subject to, the laws of the State of Texas, without regard to conflicts of law principles.
- D. As part of the consideration for this Agreement, Daugherty, Bury and the City acknowledge and agree:
 - (a) that each party has read this Settlement Agreement in its entirety and understands its terms and conditions fully and agrees to each of its terms and conditions;
 - (b) that in executing this Agreement, each party has exercised its own independent judgment, belief and knowledge of its rights after being advised from counsel of its own choosing;

- (c) that in executing this Agreement, each party hereby states that it has not relied upon any statement, promise or representation pertaining to this matter made by any other party hereto; and
- (d) that each party represents and warrants that it is authorized to execute, deliver and perform this Agreement.

Executed to be effective this ____ day of _____, 2005.

CITY OF AUSTIN

By: _____
David Allan Smith
City Attorney

KENMARE PARTNERS, Ltd.

By: _____
Charlyn C. Daugherty
President

BURY + PARTNERS, Inc.

By: _____
Paul Bury
President